STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY BARBER and STACEY BARBER, Plaintiffs-Appellants, v BANK ONE, MICHIGAN, and THE GREENER SIDE, INC., Defendants-Appellees.	UNPUBLISHED December 7, 2004 No. 249678 Wayne Circuit Court LC No. 02-209420-NI

Before: Cavanagh, P.J. and Kelly and H. Hood*, JJ.

PER CURIAM.

In this action arising out of a slip and fall, plaintiffs Anthony Barber and Stacy Barber appeal as of right the trial court's order granting summary disposition to defendants Bank One, Michigan and The Greener Side, Inc. under MCR 2.116(C)(10) and denying plaintiffs' motion for discovery sanctions against Bank One. We vacate the order granting summary disposition to Bank One and remand for further proceedings. We affirm the order granting summary disposition to Greener Side and the order denying the motion for discovery sanctions.

I. Bank One

Plaintiffs argue that the trial court erred in granting summary disposition to Bank One. Because we are unable to determine the basis on which the trial court granted Bank One's motion, we vacate the order and remand.

Subject to de novo review, summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." When determining whether there is a genuine issue of material fact, the trial court must consider the evidence in the light most favorable to the nonmoving party. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Although a property owner generally "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition," this duty does not encompass open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

512, 516; 629 NW2d 384 (2001). A danger is open and obvious when an average person of ordinary intelligence would discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). In a premises liability case, when a motion for summary disposition under MCR 2.116(C)(10) is presented:

> the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo, supra* at 517-518.]

In this case, the trial court granted Bank One's motion, stating:

> I've heard enough really on this issue.
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> You know, in this case, unlike many that the Court has, there's all kinds of testimony that go different ways and different directions. But in this case, because the photographs do depict the plaintiff's truck and the plaintiff getting out of the truck, we really do have the version, so to speak, of actually what happened. And, you know, unless the photographs have been doctored in some way or altered, he clearly is falling as he's getting out of his truck. His door's still open and it looks like he took one step and he was on the ground.
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> So really, you really get to under (C)(10) whether there's a genuine issue of material fact, and it seems to me that there's no real material dispute about where he slipped and fell and actually how it happened in view of the pictures that we have of him getting out of his car and falling right, like I said, even before the door is closed. And to me there's no factual dispute about that. Notwithstanding the fact that there's been testimony to the contrary about where exactly he slipped and fell, I think that the photographs show really where he slipped and fell.
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> And so from looking at the photographs, there really does not appear to be any breach of duty, doesn't really appear that there's any even black ice in the photograph. And if there was, I think it was kind of an open and obvious situation where a reasonable person I think would have been able to see it.
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> So I think that summary judgment is appropriate. So I'm going to grant the motion for summary judgment as to Bank One and the Greener Side based on the open and obvious doctrine.

On this record, we are unable to determine the basis on which the trial court granted summary disposition. It is unclear whether the trial court made a factual finding that a patch of ice was present, or that Barber fell as a result of another open and obvious condition, from which Bank One had no duty to protect plaintiff. It is also unclear whether the trial court determined that generally black ice as a matter of law is open and obvious, or determined that Bank One

owed no duty because the particular patch of ice in this case was open and obvious as a matter of law. It does appear, however, that the trial court made factual findings, weighing the photographic evidence against the weight and credibility of Anthony Barber and David Robinson's deposition testimony. The trial court is not permitted to make factual findings or weigh evidence in ruling on a motion pursuant to MCR 2.116(C)(10). *Manning v Hazel Park*, 202 Mich App 686, 689; 509 NW2d 874 (1993). The trial court's reliance on the photographs is particularly problematic because, as plaintiffs contend, they do not portray the entire incident and the images are somewhat dark and blurry. Because we are unable to determine the basis on which the trial court granted Bank One's motion, we vacate the order granting summary disposition and remand for further proceedings.

II. Greener Side

Plaintiff also argues the trial court erroneously applied the open and obvious doctrine to plaintiffs' claim against defendant Greener Side. We agree, but affirm because Greener Side owed no duty to plaintiff.

A party that does not have possession or control of real property cannot be held liable under a premises liability theory. *Derabian v S & C Snowplowing*, 249 Mich App 695, 702; 644 NW2d 779 (2002). Because Greener Side did not possess or control the property where Barber fell, it cannot be liable under a premises liability theory. Therefore, the trial court erred to the extent that it granted summary disposition in favor of Greener Side pursuant to the open and obvious doctrine. Greener Side, however, correctly notes that this Court may affirm the trial court's decision if it came to the correct result for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

In *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004), our Supreme Court held that "in determining whether a negligence action based on a contract and brought by a third party to that contract may lie," the "threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." If no independent duty exists, there can be no tort action based on the contract. *Id.* Accordingly, Greener Side contracted with Bank One to remove snow and ice; it owed no duty to plaintiffs that was separate and distinct from its contractual obligations. Therefore, despite its reasoning being incorrect, the trial court did not err in granting summary disposition to Greener Side.

III. Discovery Sanctions

Finally, plaintiffs argue that the trial court abused its discretion when it refused to impose sanctions against Bank One for discovery violations. We disagree.

"Whether to impose discovery sanctions is entrusted to the discretion of the trial court." *Local Area Watch v Grand Rapids*, 262 Mich App 136, 143; 644 NW2d 745 (2004). An abuse of discretion involves more than a difference in judicial opinion and occurs only when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810

(1959). Generally, sanctions are only appropriate when the discovery violation is flagrant and wanton. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999).

During the discovery period, plaintiffs requested from Bank One all videotapes depicting the events described in their complaint. After Bank One failed to produce the requested videotapes, plaintiffs obtained an order from the trial court compelling Bank One to respond to plaintiffs' first set of interrogatories and request for production. In response, Bank One stated that it could not comply for lack of information. Plaintiffs contended that this response was false, citing an insurance investigation report. Plaintiffs further contend that Bank One's delayed production of the videotape deprived them of the ability to conduct further discovery. After hearing oral argument, the trial court ruled:

> Okay. When I first read your motion I was just about prepared to grant the relief you're seeking. But after reading the defendant's response, I thought that there was some halfway legitimate reasons for not turning them over immediately or looking for them immediately. And there's always strategical reasons made by both sides as to what should go first, a deposition or a search for things that may flow from a deposition.
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> And in this case, there were some, and I don't think that it was really a significant dispute about the different dates between '01 and '02, the scheduling order dates ended up getting adjourned and discovery continued up until March of this year. And Bank One really did – I really went through all the correspondence that was submitted by Bank One trying to schedule plaintiff's dep[osition] and to see exactly where he was alleged to have fallen.
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> And I guess the bottom line is I don't think that there was such a discovery violation as to enter a severe sanction such as a default or striking the video or still shots from evidence. So I'm going to deny the motion for the default or to strike the videos.

It is clear from the record that the trial court considered all of the circumstances surrounding the delay in production of the video evidence and determined that there were legitimate reasons for the delay, which mitigated Bank One's failure to produce the videotape sooner. We conclude that the trial court did not abuse its discretion in denying plaintiffs' request for sanctions.

We vacate the order granting summary disposition to Bank One and remand for further proceedings consistent with this opinion. We affirm in all other respects. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood